Supreme Court, U.S.
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No. 98-1425

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

Luis Bonilla, *et al*,
Petitioners,

v.

Volvo Car Corporation and
Trebol Motors Corporation *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

REPLY OF THE PETITIONERS

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QUESTION PRESENTED

This suit is a class action brought by Petitioners against Respondents under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Petitioners are the purchasers of more than 9000 Volvo automobiles in Puerto Rico between 1983 and 1993. Respondents are Volvo, as well as the corporations and individuals who imported and sold Volvo cars in Puerto Rico. Petitioners alleged that Respondents fraudulently conspired to overcharge Petitioners for their cars in violation of RICO. The case was tried to a jury, which found Volvo liable for conducting a RICO enterprise and for conspiring to violate RICO. The jury awarded damages of $43 million, which the district court trebled to $129 million.

On appeal, the First Circuit found the evidence sufficient to support a finding of liability against the Respondents other than Volvo. As to Volvo, the court of appeals reversed based on circuit precedent, holding that Volvo had not itself "committed predicate acts of mail or wire fraud, a crucial element of plaintiff's RICO claim." But the First Circuit failed to recognize that its circuit precedent had been invalidated after the close of briefing on appeal. In *Salinas v. United States*, 522 US 52, ___, 118 S. Ct. 469, 476 (1997), this Court considered but rejected the First Circuit's rule, unanimously holding that RICO does not require proof that a co-conspirator such as Volvo "committed or agreed to commit the two predicate acts requisite for a substantive RICO offense."

The question presented is:

Should certiorari be granted, the judgment vacated, and the case remanded for further consideration in light of *Salinas v. United States*, 522 US 52 (1997)?

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REPLY OF THE PETITIONER

The First Circuit's ruling in this case is inconsistent with this Court's intervening decision in *Salinas v. United States*, 522 US 52, 118 S. Ct. 469, and therefore should be remanded for further consideration in light of *Salinas*. The jury found Volvo liable under both 18 USC 1962(c), based on predicate acts of mail and wire fraud, and also 18 USC 1962(d), based on Volvo's conspiracy with its codefendants. Petitioners do not challenge here the First Circuit's ruling that, because Volvo lacked the knowledge required to commit the individual classes of mail and wire fraud alleged by Petitioners, Volvo was not liable under section 1962(c). But the First Circuit's use of the same rationale in reversing the *conspiracy* judgment against Volvo directly conflicts with *Salinas*.

Contrary to Volvo's claim in the brief in opposition ("BIO"), the First Circuit never held that Volvo did not "knowingly participate" in the conspiracy. Nor does the decision below purport to address any of the evidence at trial which established that Volvo *did* facilitate the conspiracy and *did* have the intent to defraud. Finally, Volvo's argument that GVR is inappropriate because Petitioners in passing cited *Salinas* in a discretionary request for rehearing is foreclosed by precedent and furthermore contradicts completely Volvo's statement in a letter to this Court that Petitioners' request for rehearing was untimely and therefore was never considered by the First Circuit.

I. The Knowledge Required For The RICO Predicate Acts Of Mail And Wire Fraud Is Different From The Requirement Of "Knowing Participation" In A RICO Conspiracy.

The theory advanced by Volvo in the brief in opposition is legally erroneous and conflicts with *Salinas*. As the First Circuit explained, each of the "five frauds" alleged by Peti-

tioners at trial would, if proven, constitute the RICO predicate acts of mail or wire fraud, and each therefore would establish a violation of 18 USC 1962(c). Pet. App. 34. Regarding the three classes of fraud raised by Petitioners here, the court of appeals agreed that Volvo's codefendants had violated section 1962(c), but held that Volvo did not itself knowingly commit fraud and therefore was not liable under that provision. Volvo maintains that this holding under 18 USC 1962(c) *a fortiori* absolves it of liability under the conspiracy provision, 18 USC 1962*(d)*. Specifically,

> In a case such as this, where the alleged conspiracy was to be accomplished by predicate acts of mail or wire fraud – one element of which is knowing and willful intent to defraud – proof of that knowledge and intent was a required element for both the substantive RICO offense and the conspiracy RICO offense. (BIO 5.)

Volvo is not correct, except under pre-*Salinas* First Circuit precedent, which is why Volvo provides no citation for its reading of the RICO conspiracy provision. There is a substantial difference between holding that a defendant did not know about specific fraudulent conduct (and therefore cannot be held liable for mail or wire fraud) and holding that the defendant did not intend to "adopt the goal of furthering or facilitating" a conspiracy (*Salinas*, 118 S. Ct. at 477). In other words, a defendant engages in RICO a conspiracy when it seeks to further the conspiratorial goal of defrauding consumers, *even if* it does not know about and participate in the individual, overt predicate acts of mail and wire fraud. As *Salinas* explains, "If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Id.* *Salinas* thus specifically held that a RICO conspirator such as Volvo is liable under 18 USC 1962(d) even without committing or agreeing to commit any RICO predicate act such as mail or wire fraud. 118 S. Ct. at 476-77.

II. The First Circuit In This Case Held Only That Volvo Did Not Knowingly Participate In RICO Predicate Acts.

A. The First Circuit's statement of the legal standard shows that it considered only Volvo's liability for the RICO predicate acts of mail and wire fraud and never separately considered the conspiracy judgment. The First Circuit in this case addressed only Volvo's liability for mail and wire fraud, which was the predicate for Petitioners' section 1962(c) claim. The text of the decision below is plain. The paragraph introducing the court of appeals' analysis begins: "Volvo's main contention is that the evidence does not support a finding that Volvo committed *predicate acts of mail or wire fraud*, a crucial element of plaintiffs' RICO claim." Pet. App. 33 (emphasis added). After announcing the standard of review, the court continues: "To prove *mail or wire fraud*, plaintiffs must show three elements: a 'scheme to defraud,' Volvo's 'knowing and willful participation in the scheme with the intent to defraud,' and the use of the mails or interstate wire or radio communication in furtherance of the scheme." *Id.* 34 (emphasis added).

Moreover, in this discussion, the First Circuit cites only to decisions resolving mail or wire fraud claims and to 18 USC 1962(c). The only quoted discussion comes from the standard announced in *United States v. Cassiere*, 4 F.3d 1006, 1111 (1st Cir. 1993), that "[t]o prove [mail or] wire fraud the government must show . . . the defendant's knowing and willful participation in the scheme with intent to defraud." Pet. App. 34. The court then cites to another mail and wire fraud case, *McEvoy Travel Bureau v. Heritage Travel*, 904 F.2d 786, 791 (1st Cir.), *cert. denied*, 498 U.S. 992 (1990), as well as to *Ahmed v. Rosenblatt*, 118 F.3d 886, 888 (1st Cir. 1997), which affirmed the dismissal of a claim under 18 USC 1962(c) for failure to plead mail and wire fraud with particularity. Finally, the decision below in a footnote sets forth the elements of a claim under 18 USC 1962(c). Pet. App. 34 n.4. The decision below *nowhere*

suggests that the First Circuit separately considered Volvo's liability under 18 USC 1962(d).

B. Volvo's contrary reading of the decision below is erroneous. Volvo repeatedly proclaims (eight times in fact[1]), *never* with any citation to the decision below, that "the First Circuit decided that there was no evidence that Volvo entered into *any* RICO conspiracy." BIO 2. Volvo never cites to the opinion below for the simple reason that the First Circuit held no such thing and in fact never separately analyzed the conspiracy judgment against Volvo.

Volvo draws a contrary conclusion only by misconstruing the opinion below and taking quotations seriously out of context. Thus, at pages 8 to 9, Volvo quotes the First Circuit's limited statement that "[e]ven if the Monroney Act did apply to Volvo, plaintiffs' fraud claim *on this theory* would fail for lack of proof of scienter" (emphasis added). But Volvo then inserts a set of ellipses that not only skips the end of the sentence, but skips *the entire next paragraph*, only to resume with the First Circuit's discussion of Volvo's duty to disclose and the conclusion that "an inference of deliberate deception by Volvo would be impossible to sustain." But the ellipses skip intervening statements that make clear that the court of appeals was not addressing the conspiracy judgment, including particularly that "A *mail or wire fraud conviction* cannot result from a failure to disclose unless the defendant was aware of its duty to disclose." Pet. App. 53 (emphasis added).

Volvo engages in the same creative editing at page 5 of the BIO, quoting the First Circuit's reference to the requirement of "knowing and willful participation in the scheme," then ellipsing to the court of appeals' conclusion that "none of the frauds has been established against Volvo, that the

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[1] The Attorney General's brief (at 10) quoted five examples of Volvo's baseless repetition. The remaining three examples appear at (i) BIO 5, (ii) *id.* 6 n.4, and (iii) *id.* 8 & n.5.

judgment against it must be reversed, and that plaintiffs' claims against Volvo fail in their entirety." But the ellipses skips from the beginning of one paragraph to the end of an *entirely different* paragraph. Volvo omits the First Circuit's explanation that it was analyzing not the larger conspiracy, but instead only the individual claims of mail and wire fraud: "We must determine whether the evidence presented as to at least *one of the five frauds* is sufficient to support the verdict." Pet. App. 34 (emphasis added).

Any fair reading of the opinion below thus shows that the First Circuit only examined each of the frauds alleged by Petitioners, and it did so only to determine whether Volvo had knowingly participated in that particular RICO predicate act. The First Circuit did not make any more general pronouncement regarding Volvo's knowing participation in the conspiracy and did not address at all whether Volvo facilitated its codefendants' fraudulent conduct. Thus, regarding the FOB fraud, the court concluded that "no evidence implicates Volvo in false reporting of the FOB price." Pet. App. 37. Regarding the double invoicing fraud involving AUM, the court concluded that there was insufficient evidence that "Volvo had any knowledge of the double invoicing scheme." *Id.* 48. And, regarding the disclosure label fraud, the court concluded that Volvo had not played a "role in the preparation or display of the labels" or known "that AUM was furnishing false figures to Trebol." *Id.* 50. The court of appeals' analysis nowhere moves beyond these specific conclusions to address Volvo's facilitation of the conspiracy and nowhere suggests that Volvo did not knowingly participate in the conspiracy.

C. The First Circuit's failure to discuss the substantial evidence of Volvo's knowing participation in the conspiracy shows that the court of appeals did not separately address the conspiracy judgment. Volvo's reading of the First Circuit's decision also is disproven by the substantial volume of evidence relating to the conspiracy that the court of appeals

never discussed. The opinion below instead is carefully limited to evidence relating to each of the "five frauds." Petitioners had set forth at length in their brief on appeal – and the district court had described at length in its opinion (Pet. App. 4-9) – substantial evidence showing Volvo's heavy involvement in the affairs of its codefendants, including its power to make decisions for the Trebol defendants, and its incentive to profit from the fraud. *See infra*. Not only did the court of appeals not address this evidence, but *Volvo ignores it too* in the brief in opposition because the evidence was incontrovertible.

This evidence establishes not only that the court of appeals never separately addressed the conspiracy judgment in its initial opinion, but also that on remand there is a substantial chance that the First Circuit would find that "the conspiratorial agreement" in this case "can plausibly be inferred from words, actions, and the interdependence of activities and persons involved" (*Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994)).[2] To select just a few examples, the proof at trial showed that Volvo was not merely a car manufacturer, but instead had a highly unusual "open book partnership" with Trebol, as a result of which Volvo was intimately involved in setting retail prices, and which furthermore granted Volvo the power to determine issues relating to marketing, pricing, and sales, including the power to overrule Trebol's decisions. C.A. App. A.418-21, A.1734, A.2169-70, R.A.1574-82, R.A.1591, R.A. 1620-23, R.A.1700-7, R.A.1808. Given that Volvo used Trebol's re-

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[2] The First Circuit's "*cf.*" citation to the *Aetna* case addressed not this issue but instead the specific claim that "Volvo knew that Trebol was using false Law 77 labels" (Pet. App. 51 (text accompanying n.19)) and the hypothetical "interesting question whether–if Volvo did know of the fraud–the facts would allow a jury to hold Volvo liable under RICO for Trebol's deceptions simply because Volvo continued to supply cars to Trebol" (*id.* n.19).

tail prices as a "parameter[]" in "negotiating prices [with] Trebol," a reasonable jury could conclude that Volvo was aware of the grossly excessive prices that were being charged by its codefendants on the cars that Volvo provided. C.A. App. A.421, R.A.1574-82, R.A.1700-07. A large staff of Volvo employees, who regularly visited Trebol, were directly involved in "advertising," "training," and "financial assistance." Pet. App. 4a; C.A. App. A.790-91, R.A.1778-1. The pricing discussions between Volvo and Trebol specifically addressed both FOB and retail prices. C.A. App. A.1675, R.A.1622, R.A.1589-90, Exh. A, R.A.1653-54, R.A.1579-82, Exh. b, R.A.1700-07, R.A.1713-14. As noted, however, the First Circuit discussed none of this evidence, which the jury and the district judge found to be so persuasive, which establishes that the First Circuit never reached the question of Volvo's conspiratorial intent.

D. The Decision Below Is Inconsistent With This Court's Intervening Decision In *Salinas*. The First Circuit apparently failed to address the conspiracy judgment against Volvo because it believed that, as a matter of law, its holding that Volvo had not committed mail or wire fraud – and therefore could not be held liable under section 1962(c) – meant that Volvo also could not be held liable under section 1962(d). Both parties' briefs on appeal were based on precisely that view, which was mandated by First Circuit precedent that had gone unchallenged for more than fifteen years, including in ten different decisions by the members of the panel in this case *See* Pet. for Cert. 11 (citing Volvo's C.A. Br. 29 ("Thus, to support their § 1962(d) claim, plaintiffs had to prove that Volvo knowingly entered into an agreement to commit two predicate acts."); Petrs' C.A. Br. 44 (same)); Pet. for Cert. 13-14 & n.5.

Salinas, however, squarely rejected the First Circuit's long-standing precedent and therefore rejected the basis for the decision below. It now is settled – and Volvo does not contest – that a RICO conspiracy defendant need not agree to

commit two or more RICO predicate acts but instead is liable if it "adopt[s] the goal of furthering or facilitating the criminal endeavor." *Salinas*, 118 S. Ct. at 476-77. *Salinas* was decided on the date of argument in this case, after the briefing was long-completed, and Volvo does not contend that the First Circuit was aware of *Salinas* when it issued its opinion in this case. GVR accordingly is warranted.

III. The First Circuit Did Not Account For *Salinas* As A Result of Petitioners' Rehearing Request.

Volvo argues finally that the First Circuit was aware of *Salinas* as a result of Petitioners' request for rehearing. But that claim is foreclosed by this Court's precedents. In the leading modern decision on GVR practice, *Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam), the Court explained that a GVR order is appropriate even when the intervening decision has been discussed in the briefing below:

> The only pertinent difference that we can discern between [the *Lawrence* case and *Stutson v. United States*, 516 U.S. 193 (1996) (per curiam)] is that the recent Supreme Court precedent was briefed to the Court of Appeals in *Stutson*, but we have never held lower court briefing to bar our review and vacatur where the lower court's order shows no sign of having applied the precedents that were briefed. . . . [I]t is important that the meaningful exercise of this Court's appellate power not be precluded by uncertainty as to what the court below "might . . . have relied on."

516 U.S. at 169-70. The Court similarly explained in *Lords Landing Village Condominium Council v. Continental Insurance Co.*, 520 U.S. 893 (1997) (per curiam), that GVR is appropriate notwithstanding that "[t]he appellate court nevertheless denied a petition for rehearing."

Nor does the rehearing request in this case support Volvo's claim. The *entire* discussion of *Salinas* in that request reads as follows: "Moreover, the opinion fails to consider the Supreme Court's recent ruling in *Salinas v. United States*, 118 S.Ct. 469 (1997), which held that a defendant can be convicted for RICO conspiracy, even if he is not convicted of a substantive RICO violation."[3] Petrs' Petition for Rehearing *En Banc* 2. There is no follow-up discussion. That one sentence, in fact, appears in the "Introduction" section of the brief. Nor is *Salinas* listed as one of the four issues raised by the Petition. In point of fact, neither *Salinas* nor 18 USC 1962(d) are cited *anywhere* in the argument section of the rehearing request.

Volvo's argument also is extraordinary – some might say disingenuous – given that Volvo previously took precisely the opposite position in this Court. When Petitioners sought an extension of time to file the Petition for Certiorari, Volvo wrote to the Clerk contending that Petitioners' rehearing request in the First Circuit was untimely and therefore had not been considered by the First Circuit. *See* Pet. for Cert. 2-4 (discussing Letter from Gael Mahony, Counsel to Volvo, to William K. Suter (dated Jan. 4, 1999) (on file with the Clerk's office)). Now Volvo abandons that argument and takes the contrary position that the First Circuit must have known of and considered *Salinas*' holding because it must have carefully reviewed Petitioners' rehearing request.

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[3] *Salinas* is cited without textual discussion, along with fourteen other cases, in an unnumbered page within the counsel's statement attesting that rehearing *en banc* was warranted. Volvo says that *Salinas* was the "very *first* case cited" (BIO 17 (emphasis in original)), but that was because *Salinas* came first in "Blue Book" citation order. We think it is obvious to anyone who has served as a judge or law clerk that, as a practical matter, a court of appeals does not rely on the counsel's certification in making its substantive determination whether a sufficient error has occurred justifying rehearing.

Given its complete reversal in position, Volvo cannot ask this Court for the benefit of the doubt in construing the First Circuit's discretionary denial of rehearing to constitute a substantive ruling that the conspiracy judgment against Volvo fails under the standard articulated in *Salinas*.

* * * *

Finally, Volvo never disputes the other considerations justifying a remand in this case. The First Circuit must determine whether Petitioners are entitled to a new trial under the standard articulated in *Salinas*. Pet. for Cert. 22. In addition, remand will clarify whether plenary review should be granted by this Court to resolve the two conflicts in the circuits that this case presents. *Id.* 23-24. Just as important, doubts should be resolved in favor of GVR, given the minimal burden on the court of appeals, as well as the unquestionable importance of the judgment in this case to the government of Puerto Rico and the more than 9,000 Puerto Rico consumers who were defrauded and have been stripped of the jury's $129 million judgment by the decision below. *Accord* Attorney General's Br. 1-4.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *Salinas v. United States*, 522 US 52 (1997).

Respectfully submitted,

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